THANGASAMY BROWN DN GNANAYUTHAM A

v.

PELABUHAN TANJUNG PELEPAS SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
[CIVIL APPEAL NO: P-04-67-04]
22 SEPTEMBER 2008 C

LABOUR LAW: *Industrial Court - Award - Compensation for constructive dismissal - Compensation limited to balance period of three months of six-month fixed term contract of employment - Whether employee on a permanent contract of employment - Whether compensation rightfully ordered by Industrial Court* D

The appellant was employed by the 1st respondent company as an IT Advisor on a six-month fixed term contract of employment on a basic salary of RM9k per month. He tendered his resignation E barely three months into the contract claiming he had been constructively dismissed. The matter was referred to the Industrial Court (the 2nd respondent) which held that the appellant was constructively dismissed without just cause and excuse. The Industrial Court ordered the 1st respondent company to pay F compensation for the balance contract period of three months the appellant would have worked had he not been constructively dismissed. In addition, a further three months' remuneration was ordered as exemplary compensation for the acts of victimisation the appellant endured at the hands of the 1st respondent's G General Manager of the IT division. The total sum awarded to the appellant was therefore RM71,880. The appellant sought to quash that part of the award on the ground that he was employed on a permanent contract of employment and the compensation awarded to him ought not to be limited to the balance of the contract H period. The High Court dismissed his application for judicial review and he now appealed against that decision.

I

Held (dismissing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) The Industrial Court had carefully considered and analysed the appellant's claim that he had been employed as a permanent employee rather than an employee engaged for a fixed term of six months. Based on the oral and documentary evidence before it, the Industrial Court ultimately came to the conclusion that the appellant was employed on a "fixed term contract". There were negotiations between the appellant and the 1st respondent's top management. There was an agreement reduced into writing and the parties had agreed to a term of six months' employment. The Industrial Court saw no reason to add to or vary the said agreement in writing. (para 10)

(2) The Industrial Court's careful analysis of the evidence as well as the finding of facts and law did not demonstrate a decision so unreasonable that no reasonable authority could ever have come to it. The Industrial Court's decision on the issue of fix term contract was consistent with established principles of law. Having found that the appellant was engaged for a fixed term period of six months and the contract terminating by effluxion of time, there was no question of reinstatement but only compensation to be considered by the Industrial Court for the premature termination arising from the constructive dismissal. In the circumstances, the Industrial Court correctly awarded compensation consisting of the remuneration the appellant would have earned for the balance sum of the contract together with an exemplary award, equivalent to three months' remuneration for the victimisation that had led to his resignation. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Perayu bekerja dengan syarikat responden pertama sebagai Penasihat IT berdasarkan suatu kontrak pekerjaan untuk tempoh enam bulan dengan gaji asas RM9 ribu sebulan. Bagaimanapun, beliau berhenti kerja sebelum sempat menghabisi tiga bulan kontraknya atas alasan bahawa beliau telah diberhentikan kerja secara konstruktif. Halperkara telah dirujuk ke Mahkamah Perusahaan (responden kedua) di mana mahkamah memutuskan bahawa perayu telah diberhenti kerja secara konstruktif tanpa alasan-alasan yang adil dan wajar. Mahkamah Perusahaan dengan

itu memerintahkan syarikat responden pertama supaya membayar pampasan untuk baki tiga bulan yang perayu akan bekerja jika tidak diberhentikan kerja secara konstruktif. Selain itu, bayaran tiga bulan gaji juga diberikan sebagai pampasan tauladan kerana penganiayaan yang dilakukan oleh Pengurus Besar bahagian IT responden pertama terhadap perayu. Berikutnya, suatu award keseluruhan berjumlah RM71,880 telah dibenarkan kepada perayu. Perayu bagaimanapun memohon supaya bahagian award ini dibatalkan atas alasan bahawa beliau telah diambil bekerja berdasarkan kontrak pekerjaan tetap, yang bermakna pampasan yang diawardkan tidak seharusnya terhad kepada tempoh kontrak yang masih berbaki. Mahkamah Tinggi menolak permohonan perayu dan perayu merayu terhadap penolakan tersebut.

Diputuskan (menolak rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Perusahaan telah meneliti dengan cermat dan menganalisa dakwaan perayu bahawa beliau telah diambil bekerja sebagai pekerja tetap dan bukan hanya untuk satu tempoh enam bulan. Berdasarkan kepada keterangan lisan dan dokumentari di hadapannya Mahkamah Perusahaan akhirnya mencapai keputusan bahawa perayu telah diambil bekerja berdasarkan suatu "kontrak tetap bertempoh". Terdapat juga beberapa rundingan di antara perayu dengan pengurusan tertinggi responden pertama dan suatu perjanjian bertulis telah dicapai di mana pihak-pihak bersetuju dengan tempoh pekerjaan enam bulan. Mahkamah Perusahaan dengan itu tidak melihat adanya alasan untuk menambah atau mengubah perjanjian bertulis tersebut.

(2) Dengan Mahkamah Perusahaan menganalisa keterangan-keterangan secara teliti, maka dapatan-dapatan fakta dan undang-undangnya tidak menggambarkan satu keputusan yang amat tidak munasabah sehinggakan tiada tribunal yang munasabah akan mencapai keputusan yang sedemikian. Keputusan Mahkamah Perusahaan berkaitan isu kontrak bertempoh adalah konsisten dengan undang-undang yang digunapakai. Setelah mendapati perayu diambil bekerja berdasarkan kontrak bertempoh selama enam bulan dan kontrak telah pun luput oleh penamatan masa, maka soal

A pengembalian semula jawatan sudah tidak berbangkit dan yang perlu dipertimbang oleh Mahkamah Perusahaan hanyalah soal pampasan akibat dari tindakan pembuangan kerja secara konstruktif. Dengan demikian, Mahkamah Perusahaan telah dengan betulnya mengawardkan pampasan yang mengandungi
B imbuhan yang perayu akan perolehi dari baki kontrak pekerjaannya, beserta dengan award tauladan yang bersamaan dengan tiga bulan gaji disebabkan oleh penganiayaan terhadapnya yang membawa kepada pemberhentian kerjanya.

C **Legislation referred to:**
Industrial Relations Act 1967, s. 20

For the appellant - B Lobo; M/s Raveen & Assoc
For the respondents - S Nantha Bala; M/s Zul Rafique & Partners

D *[Appeal from High Court, Pulau Pinang; Judicial Review No: 25-5-2003]*

[Editor's note: For the High Court judgment, please see Thangasamy Brown DN Gnanayutham lwn. Pelabuhan Tanjung Pelepas Sdn Bhd & Satu Lagi [2005] 3 CLJ 83.]

E *Reported by Usha Thiagarajah*

JUDGMENT

F **KN Segara JCA:**

[1] The appellant is a Malaysian citizen, 54 years of age, possessing academic qualifications in engineering and law. He was employed by the 1st respondent company as an IT Advisor on a
G six months fixed term contract with effect from 1 July 2000. The terms and conditions of employment are found in the appellant's letter of offer of employment dated 10 May 2000. The appellant accepted the offer of employment on the said terms and conditions and duly signed the acceptance on 1 June 2000. Barely three
H months into the contract, by letter dated 25 September 2000, the appellant tendered to the 1st respondent company his resignation, claiming that he had been constructively dismissed.

[2] The relevant terms of the fixed term employment relating to the period of the contract, salary and termination of employment
I appear in the letter of offer at cls. 1, 2 and 9 which reads:

1. PERIOD OF CONTRACT

This contract of employment shall be for a period of six (6) months commencing from 1st July 2000 and will expire on 31 December 2000, unless terminated earlier by either party by giving notice in accordance with the provision of article 9 of this agreement.

2. SALARY

Your basic salary will be RM9,000.00 per month.

3. ANNUAL LEAVE

...

4. WORKING HOURS

...

5. EMPLOYEES' PROVIDENT FUND

...

6. MEDICAL BENEFITS AND HOSPITALISATION

...

7. COMPANY CAR

...

8. BONUS

...

9. TERMINATION OF EMPLOYMENT

During the validity of this contract either party may terminate this contract of employment by serving one (1) month written notice or the payment of one (1) month salary *in lieu* thereof.

10. CODE OF CONDUCT

...

11. COMPANY'S RIGHT TO AMEND

...

12. MEDICAL CHECK-UP

...

[3] The dispute between the appellant and the 1st respondent company arises from a representation for unfair dismissal made by the appellant under s. 20 of the Industrial Relations Act 1967 in respect of his constructive dismissal by the 1st respondent company with effect from 25 September 2000. The Minister referred the dispute to the Industrial Court, the 2nd respondent herein.

[4] On 30 December 2002 the Industrial Court handed down its award and held that the appellant was constructively dismissed without just cause or excuse. The Industrial Court also made a finding of fact that the appellant was engaged for a fixed term period of six months and ordered that the appellant be compensated with the remuneration that he would have earned for the balance period (three months) of the six months contract, as well as a further three months remuneration as exemplary compensation for the 1st respondent's conduct, which the Industrial Court found to be deplorable acts of victimization of the appellant, at the hands of 1st respondent's General Manager of the IT Division. The total sum awarded to the appellant was RM71,880. The 1st respondent paid the said sum of RM71,880 in compliance of the award but the appellant sought to quash this part of the award by an application for judicial review in the High Court, Penang.

[5] On 19 May 2004, the High Court dismissed the appellant's application for judicial review with costs and upheld the Industrial Court's award for the appellant's constructive dismissal by the 1st respondent. The appellant now appeals against that decision.

[6] We are satisfied that the learned High Court judge was clearly mindful of the fact that the proceeding before him was not in the nature of an appeal to review the findings of the Industrial Court. He had correctly approached the matter in judicial review with a view to discover any procedural impropriety, illegality or irrationality on the part of the Industrial Court in arriving at the decision and the award, so as to have exceeded its jurisdiction. We are unanimous there is no merits in this appeal before us.

[7] The finding of constructive dismissal without just cause or excuse of the appellant made by the Industrial Court was neither the subject matter of judicial review before the High Court nor the

subject of appeal before us. Therefore, the facts leading to the constructive dismissal of the appellant shall not be adverted to in this judgment.

[8] The crux of the issue for determination in this appeal is whether the appellant was employed on six month fixed term contract thereby justifying the remedy awarded by the 2nd respondent and not the remedy of re-instatement.

[9] The appellant claimed that he was employed on a permanent contract of employment and therefore the compensation awarded to him by the 2nd respondent ought not to be limited to the balance of the contract period.

[10] The appellant's claim that he had been employed as a permanent employee with the right to full security of tenure as a regular employee of the 1st respondent rather than an employee engaged for a fixed term of six months had been very carefully considered and analyzed by the Industrial Court. Premised upon the oral as well as documentary evidence before it, the Industrial Court ultimately came to the conclusion that the appellant was employed on a "fixed term contract". There were negotiations between the appellant and the 1st respondent's top management. There was an agreement reduced into writing and the parties had agreed to a term of six months employment. The Industrial Court saw no reason to add to or vary the said agreement in writing. The Industrial Court in its award, *inter alia*, stated:

> The 6-month term is expressly stated in the offer of employment. It was accepted unreservedly by the claimant when he appended his signature accepting the contents of the terms and conditions of employment. The Court sees no reason to go beyond the terms of the letter of offer which was the ultimate expression of the contractual intent of the parties who for all intents and purposes were negotiating at arms length.

[11] The Industrial Court further stated in its award:

> From the purpose of the Claimant's employment, the nature of work the Claimant was doing and the situation that the Company was under, the Court accepts the evidence of the DCEO (CO-W4) and finds the Claimant's appointment was to give the Company's IT division continuity in support of Yasmin/CMC IT system as the Company was concerned that there should be someone on top of the situation. The Company found that person

in the Claimant. The Company's top management may well have expressed to the Claimant their dissatisfaction with the performance of the GM of the IT Division. They might have even wished him away and the Claimant might have entertained thoughts of taking over the said GM's position or leading the Company in the implementation of its vision for the IT Division over the years to come, but that is not the same as offering the Claimant the GM's job or offering the Claimant permanent employment when there was no vacancy for the GM's position or some other permanent post to be filled. Mere representation of possibilities *inter alia* that the Claimant will have a good chance for promotion and long term job security do not transform themselves into terms of a contract of employment, much less fundamental terms contradicting the express words of the contract except in cases where there is a cogent case of promissory estoppel or collateral contracts pleaded and proven by the Claimant.

The Court is of the view that the Claimant's case that he had a legitimate expectation to regular employment with full security of tenure as he was lured into the Company while he was still with Yasmin and he had in consequence thereto given up his job with Yasmin does not stand up to careful scrutiny. The Claimant was not an employee under a contract of service with Yasmin. His Company, Cergas, had a contract to provide the services of a Project Manager for a term of 18 months for the IPTMIS project. The said contract was expiring and there is scant evidence that there was going to be another contract between Yasmin and Cergas. ... The Claimant was not giving up a secured employment at a superior salary and terms and conditions as alleged but rather was negotiating for a position in the Company when his Company's (Cergas') contract with Yasmin had expired. To put it plainly, the Claimant cannot be said to have given up the security of tenure he claimed to have had with Yasmin for the 6-month contract which he was offered by the Company.

...

...

The Court holds that the Claimant was engaged by the Company for a fixed term period of 6 months.

[12] We are unanimous that the Industrial Court's careful analysis of the evidence as well as the findings of facts and law does not demonstrate a decision so unreasonable that no reasonable authority could ever have come to it. The Industrial Court's decision on the issue of fix term contract is consistent with

established principles of law. Having found that the appellant was engaged for a fixed term period of six months (commencing 1 July 2000-31 December 2000) and the contract terminating by effluxion of time on 31 December 2000, there is no question of reinstatement, but only compensation to be considered by the Industrial Court for the premature termination arising from the constructive dismissal which occurred on 25 September 2000. In the circumstances, we are unanimous that the Industrial Court correctly awarded compensation consisting of the remuneration the appellant would have earned for the balance sum of the contract together with an exemplary award, equivalent to three months remuneration, for the 1st respondent's conduct (that is, the company's General Manager of the IT Division) towards the appellant which contributed to the appellant's resignation on 25 September 2000.

[13] We are unanimous the appeal be dismissed with costs. The decision of the High Court is affirmed and the award of the Industrial Court upheld. Deposit towards taxed costs of the 1st respondent.